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Supreme Court, U.S.
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NO. 98-212

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

MICHIGAN,

Petitioner,

v.

JERRY L. BASS,

Respondent.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

---

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT IN SUPPORT OF MOTION

STATE APPELLATE DEFENDER OFFICE

BY: David A. Moran
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Attorney for Respondent

19 pp

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Respondent Jerry L. Bass respectfully asks this Honorable Court, pursuant to Supreme Court Rule 39, for leave to proceed *in forma pauperis* so that he may file the accompanying Brief in Opposition to Petition for a Writ of Certiorari with this Court.

Respondent was found by the state trial court to be indigent for purposes of state appellate proceedings, was appointed counsel for that purpose, and is represented in this Court by that appointed counsel.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

DAVID A. MORAN
(Counsel of Record)
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

Attorney for Respondent

Dated: August 13, 1998

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any question in this affidavit will subject me to the penalties for perjury.

Jerry Lorenzo Bass
JERRY L. BASS

Subscribed and sworn to before me
this 7th day of August, 1998.

FELIX R. CARRIZALES
Notary Public, Muskegon County, MI
My Commission Expires Sept. 6, 2000

Notary Public, _____ County, Michigan
My Commission Expires: _____

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STATEMENT OF THE CASE

On May 2, 1994, the Michigan Supreme Court, by a vote of 4-3, adopted an order amending Mich.Ct.R. 6.425, 6.433, and 7.210 ("the amended court rules"). 445 Mich. cix, *et seq*. (1994). Four years later, on May 6, 1998, the Michigan Supreme Court, by a vote of 5-2, issued an order repealing the amended court rules. 457 Mich. xvi, *et seq*. (1998).

The amended court rules, when they were in effect, generally precluded an indigent defendant from obtaining a copy of his or her jury selection transcript for use on direct appeal. The only exceptions were for an indigent defendant who "challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause." Mich.Ct.R. 6.425(F)(2)(a)(i).

The amended court rules did not contain an exception for cases in which the indigent's appellate attorney was not the trial attorney. Therefore, a newly-appointed appellate attorney in Michigan was generally barred from reading the jury selection portion of his indigent client's trial transcript unless he: (1) somehow learned that errors may have been committed during that portion of the trial; and (2) then convinced the same trial judge who may have committed those errors that there was "good cause" to provide the transcript.

By contrast, the court rules provided that if the criminal appellant was not indigent, he or she "**shall** order from the court reporter or recorder the **full** transcript of testimony and other proceedings in the trial court or tribunal." Mich.Ct.R. 7.210(B)(1)(a) (emphasis added). For a moneyed appellant, a complete transcript was required unless: (1) the appellant moved for

permission to file an incomplete transcript and the trial court so ordered; or (2) all parties stipulated to an incomplete transcript. Mich.Ct.R. 7.210(B)(1)(c)-(e).

Shortly after the Michigan Supreme Court adopted the amended court rules in 1994, Respondent Jerry Bass was tried in the Wayne County (Michigan) Circuit Court on cocaine possession and delivery charges. Mr. Bass was ultimately convicted.

Mr. Bass declared indigence and appealed as of right, and his trial transcript, except for the jury voir dire, was prepared and filed in mid-1995. In the fall of 1995, Mr. Bass' newly-appointed appellate counsel contacted trial counsel by telephone in an effort to learn whether she could recall any potential errors that may have occurred during the voir dire some 18 months earlier. Appellate counsel's notes reflected that trial counsel "doesn't remember voir dire."

Not having knowledge of any specific errors that would constitute "good cause" under the amended court rules, Mr. Bass' new appellate counsel filed a brief in the Michigan Court of Appeals arguing that the Fourteenth Amendment Equal Protection Clause and the Sixth Amendment right to the effective assistance of appellate counsel entitled Mr. Bass to obtain and use the voir dire transcript without having to show "good cause" to the trial court. On April 25, 1997, the Court of Appeals held that the amended court rules did not violate Mr. Bass' Equal Protection Clause rights but did violate his Sixth Amendment right to the effective assistance of his new appellate attorney. *People v. Bass*, 565 N.W.2d 897, 904-906 (Mich. App. 1997). The Court of Appeals ordered that Mr. Bass be provided with a copy of his voir dire transcript "to determine if any justifiable claims of error occurred during the voir dire." *Id.* at 906.

The Michigan Supreme Court then granted the prosecution's application for leave to appeal. On appeal before the Michigan Supreme Court, Mr. Bass argued that the amended court

rules violated both the Equal Protection Clause and his Sixth Amendment right to the effective assistance of his appellate attorney.

On May 6, 1998, some five months after oral arguments, the Michigan Supreme Court issued an order vacating its earlier grant of the prosecution's application for leave to appeal. *People v. Bass*, 577 N.W.2d 667 (Mich. 1998). The court explained that its order denying leave to appeal was premised on the understanding that the Court of Appeals had held that the amended court rules "constitute state interference with appellate counsel's ability to provide effective assistance[.]" *Id.* Two justices dissented from the order.

Also on May 6, 1998, the Michigan Supreme Court issued a separate administrative order repealing the amended court rules. 457 Mich. xvi, *et seq.* (1998). The two justices who had dissented from the dismissal of the *Bass* appeal also dissented from the repeal of the amended court rules.

On July 31, 1998, this Court docketed the Petition for a Writ of Certiorari in this Court.

ARGUMENT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE PETITIONER HAS NOT IDENTIFIED AN ISSUE WORTHY OF REVIEW, BECAUSE THE ISSUE IS MOOT, AND BECAUSE THE STATE COURTS REACHED THE CORRECT RESULT.

Mr. Bass respectfully requests that this Court deny the Petition for a Writ of Certiorari for three reasons. First, the Petitioner has not attempted to identify any issue on which state or lower federal courts have conflicted or any unsettled issue that ought to be settled by this Court. *See* S.Ct.R. 10. Instead, the Petitioner has simply expressed its disagreement both with the Michigan Supreme Court's decision to dismiss its appeal and with the underlying decision of the Michigan Court of Appeals. Therefore, the Petitioner has failed to articulate any reason for the exercise of this Court's jurisdiction. *Id.*

Second, the question as to whether the amended court rules were constitutional is no longer a live controversy. The Michigan Supreme Court, acting in its administrative capacity, has repealed the amended court rules in their entirety. 457 Mich. xvi, *et seq.* (1998). In its order repealing the amended court rules, which the court had adopted four years earlier by a vote of four to three, the Michigan Supreme Court gave no indication that it would resurrect the amended court rules were they found to be constitutional.

Since Mr. Bass now has a copy of his jury selection transcript and since this Court cannot force the Michigan Supreme Court to re-adopt the amended court rules that it has repealed, there is no live controversy remaining in this case. *See Princeton University v. Schmid*, 455 U.S. 100 (1982) (dismissing appeal as moot where university repealed challenged regulation during pendency of appeal); *cf. City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-289

(1982) (challenge to repealed ordinance not moot where city announced intent to reenact ordinance if judgment vacated). Therefore, the petition should be denied as moot.

Third, the Michigan Court of Appeals reached the correct result in concluding that the amended court rules violated the United States Constitution. While that holding was based on, and fully supported by, the Sixth Amendment right to the effective assistance of appellate counsel, the same result was also mandated by the Fourteenth Amendment Equal Protection Clause, a ground that the Court of Appeals considered and rejected. *Bass*, 565 N.W.2d at 904-905.

The amended court rules at issue precluded Mr. Bass, solely because of his indigence, from obtaining and using his voir dire transcript on his direct appeal, even though he was represented by a new counsel on appeal. Mich.Ct.R. 6.425(F)(2)(a)(i). The amended court rules explicitly applied only to indigent criminal defendants; by contrast, the court rules **require** a moneyed appellant to obtain a complete trial transcript for appeal, unless the moneyed appellant consents to an incomplete transcript. Mich.Ct.R. 7.210(B)(1).

The amended court rules thus violated the Equal Protection Clause by denying indigent defendants the right to receive trial transcripts for appeal when such transcripts were available to paying defendants. *Griffin v. Illinois*, 351 U.S. 12 (1956).

In the decade after *Griffin*, this Court twice recognized that equal protection is not satisfied by a scheme, such as the one contained in the amended court rules, in which the trial judge decides whether there is "good cause" for an indigent defendant to receive particular transcripts for appeal. *Eskridge v. Washington Prison Board*, 357 U.S. 214 (1958); *Draper v. Washington*, 372 U.S. 487, 497 (1963). In case after case since *Griffin*, this Court struck down

state regulations and practices that denied indigent defendants the same access to their transcripts that moneyed defendants enjoyed. *Lane v. Brown*, 372 U.S. 477 (1963) (striking down state rules denying indigent defendants free transcripts of coram nobis hearings); *Long v. District Court of Iowa*, 385 U.S. 192 (1966) (striking down state rule denying indigent defendant free transcript of state habeas proceedings); *Roberts v. LaVallee*, 389 U.S. 40 (1967) (striking down state statute denying indigent defendant free preliminary examination transcript); *Gardner v. California*, 393 U.S. 367 (1969) (striking down state denial of free transcript of indigent defendant's state habeas corpus proceeding); *Williams v. Oklahoma City*, 395 U.S. 458 (1969) (striking down state scheme requiring defendant convicted of petty offenses to pay for transcript in order to appeal); *Mayer v. Chicago*, 404 U.S. 189 (1971) (striking down state rules denying indigent defendants free transcript of misdemeanor trials).

Although this Court stated in *Mayer* that something less than a full transcript might suffice in some cases, this Court immediately added, "We emphasize, however, that the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way." 404 U.S. at 195.

This Court has also directly held that the appointment of new counsel on appeal is one of the circumstances in which a complete trial transcript is necessary to assure the indigent as effective an appeal as that available to a wealthy defendant. *Hardy v. United States*, 375 U.S. 277 (1964). In *Hardy*, this Court did not need to reach the constitutional issues presented but instead decided the case under federal supervisory powers. This Court recognized that a partial

trial transcript might suffice if trial counsel continues to represent the indigent defendant on appeal,

> But when, as here, new counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript? His duty may possibly not be discharged if he is allowed less than that.

Id. at 280. This Court went on to recognize that an attorney entering the case on appeal has no way of finding out what happened in the trial unless he can read the entire trial transcript:

> [T]he new counsel is operating under serious handicaps. Normally he has no prior acquaintance with the trial proceedings and no personal knowledge of the case which would form a basis for sound judgment. . . .
>
> In order to investigate whether the appeal involves one or more "not plainly frivolous" issues, counsel may examine the formal documents on record in the trial court; he may interview his client; he may discuss the case with defendant's trial counsel and with the prosecutor; . . . Such efforts are apt to be incredibly time-consuming and frustrating, and sometimes may arouse in counsel a feeling that he would be well advised to avoid future assignments of appellate in forma pauperis work. But worse than that, in many instances these efforts will be wholly unsatisfactory as a means of safeguarding defendant's rights.
>
> Recollections and notes of trial counsel and of others are apt to be faulty and incomplete. Frequently, issues simply cannot even be seen--let alone assessed--without reading an accurate transcript.

Id., at 280 n. 3, (quoting Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783 (1961)).

Since 1963, this Court has recognized that a criminal defendant has a Sixth Amendment right to the effective assistance of appellate counsel during a first appeal of right. *Evitts v. Lucey*, 469 U.S. 387, 396-399 (1985); *McCoy v. Court of Appeals*, 486 U.S. 429, 436 (1988).

Application of these principles to this appeal was straightforward. Mr. Bass is an indigent defendant who exercised his appeal as of right. He was appointed new appellate counsel, who was handicapped by the complete absence of any idea as to what might have happened during Mr. Bass' voir dire. *Hardy* at 280. As is almost always the case, trial counsel, when contacted long after the trial, could not remember what had happened during the voir dire. See *Hardy* at 280 n. 3 ("Recollections and notes of trial counsel and of others are apt to be faulty and incomplete. Frequently, issues simply cannot even be seen--let alone assessed--without reading an accurate transcript"). Therefore, Mr. Bass' new appellate counsel had no conceivable way to argue to the trial court that there were specific grounds for appeal that would constitute "good cause" to obtain the transcript.

On the other hand, if Mr. Bass had been wealthy, the court rules would have **required** his new appellate counsel to obtain the jury selection transcript for use on direct appeal unless Mr. Bass specifically decided to do without. Mich.Ct.R. 7.210(B)(1)(a). Mr. Bass was barred from having his new appellate counsel review that transcript solely because he was poor.

Therefore, the amended court rules violated Mr. Bass' Equal Protection Clause right to "as effective an appeal as would be available to the defendant with resources to pay his own way." *Mayer* at 195. Since his new appellate counsel would be unable to "faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript," *Hardy* at 280, the amended court rules also violated his Sixth Amendment right to the effective assistance of appellate counsel.

Not surprisingly, virtually every state and federal court to reach the precise issue presented in this appeal has come to the same conclusion as the Michigan Court of Appeals:

when an indigent defendant is represented by a new attorney on appeal, the defendant is entitled to the entire trial transcript, including the voir dire. *See United States v. Gregory*, 472 F.2d 484, 486 (5th Cir. 1973) (defendant represented by new counsel on appeal entitled to transcript of voir dire and closing arguments); *United States v. Margetis*, 975 F.2d 1175, 1176 (5th Cir. 1992) ("When a defendant is represented by an appellate lawyer different from the trial lawyer, a complete and accurate transcript is an imperative"); *United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994) ("A criminal defendant has a right to a record on appeal which includes a complete transcript of the proceedings at trial"); *United States v. Cashwell*, 950 F.2d 699, 703-704 (11th Cir. 1992) (same); *United States v. Sawyer*, 827 F.Supp 376 (E.D.Va. 1993) (requiring automatic production of voir dire transcript if appellate counsel newly appointed); *People v. Gaston*, 573 P.2d 423 (Cal. 1978) (scheme requiring newly-appointed appellate counsel to show good cause to obtain portions of trial transcript violates Equal Protection Clause); *In the Interest of T.V.*, 563 N.W.2d 612, 614 (Iowa 1997) (complete trial transcript required for new appellate counsel); *State v. Ford*, 338 So.2d 107, 109 (La. 1976) (same); *State v. Rone*, 328 N.E.2d 811 (Ohio 1975) (same); *Commonwealth v. Smith*, 427 A.2d 1378, 1379 (Pa. Super. 1981) (reversing, as violative of *Griffin*, trial court's refusal to provide voir dire transcript); *Green v. State*, 450 S.W.2d 27, 29 (Tenn. App. 1969) (production of full trial transcript required "where counsel on appeal is different from counsel in the trial court"); *Bennett v. Paxson*, 932 S.W.2d 81, 82-83 (Tex. App. 1996) (granting mandamus where trial court refused to provide voir dire transcript to indigent defendant's new appellate counsel).

Thus, whether the amended court rules are analyzed under the Equal Protection Clause or the Sixth Amendment right to the effective assistance of appellate counsel, the result is the

same. The Michigan Court of Appeals recognized, along with virtually every state and federal court to reach this issue, that new appellate counsel cannot effectively represent the defendant if he or she is denied access to the complete trial transcript. Therefore, the Michigan Court of Appeals correctly held that the amended court rules could not be constitutionally applied to bar indigent defendants represented by new appellate counsel from receiving a copy of the voir dire transcript.

Since the Petitioner has failed to identify any issue worthy of review, since the issue Petitioner has identified is moot, and since the underlying decision on the merits is correct, Mr. Bass respectfully submits that this Court should deny the Petition for a Writ of Certiorari.

CONCLUSION

Therefore, Respondent Jerry L. Bass respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

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Dated: August 13, 1998